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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 592.

ROBERT E. KLEINSCHMIDT,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
a Corporation.

PETITIONER'S REPLY BRIEF.

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INDEX.

Page

Subject Index.

Reply Brief 1–5

The Dismissal of Petitioner's Appeal Constituted an an Unconstitutional Discrimination 1

Cases Cited.

American Railway Express Co. v. Kentucky, 273 U. S. 269, l. c. 273..... 2

Barbier v. Connolly, 113 U. S. 27, l. c. 31..... 3

Brown v. Mississippi, 297 U. S. 278..... 4

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, l. c. 558-559 3

Truax v. Corrigan, 257 U. S. 312, l. c. 332-333, 336..... 2, 5

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The Dismissal of Petitioner's Appeal Constituted an Unconstitutional Discrimination.

The respondent in its suggestions in opposition to the petition for writ of certiorari attempts to dispatch petitioner with the curt contention that the claimed violation of the petitioner's constitutional rights arose through "an erroneous decision of a state court construing and applying valid state enactments." This would totally disregard the substance of petitioner's complaint that the Supreme

Court of Missouri denied petitioner a review of his appeal on the merits by construing its Rule 15 in an arbitrary manner contrary to the construction placed thereon in all other cases.

In American Railway Express Co. v. Kentucky, 273 U. S. 269, cited by the respondent, this Court reviewed on certiorari the decision of the Court of Appeals of the State of Kentucky. It affirmed the decision of the Kentucky Court, saying (l. c. 273):

> "The action of the court followed a fair hearing, and there is no pretense that the challenged views were adopted in order to evade a constitutional issue. We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'"

The cited case is readily distinguishable from the petitioner's case, because the Supreme Court of Missouri in the petitioner's case denied him a hearing of his appeal on the merits, and the dismissal of petitioner's appeal under the circumstances shown constituted an arbitrary and capricious action. The petitioner complains not merely of the failure to grant him due process of law, but further complains that the discrimination and oppression of inequality have been applied against him.

In Truax v. Corrigan, 257 U. S. 312, it is said respecting the Fourteenth Amendment (l. c. 332-333):

> "Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law'; 'This is a government of laws, and not of men'; 'No man is above the law'—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws. But the framers

and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

There is no rigid, cast-iron rule for determining what constitutes an unconstitutional discrimination against a litigant. In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, it is said (l. c. 558-559):

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.'"

And in Barbier v. Connolly, 113 U. S. 27, l. c. 31, the court said:

"The 14th Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty

> or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

The respondent cannot effectively answer petitioner's challenge of unconstitutional discrimination by asserting that the state forms of legal procedure have been complied with and that the wrong inflicted upon the petitioner resulted from "mere error." The decisions in Brown v. Mississippi, 297 U. S. 278, and similar cases demonstrate that violations of constitutional rights by state courts are not converted into "mere errors" through being disguised under the forms of the state's legal procedure. This Court will not be deterred from acting to protect citizens against the violations of their constitutional rights because of such pretense, but the Court will examine into the essence of what was done and the wrongful results thereof.

The Court will note that respondent's brief (called "Respondent's Suggestions in Opposition to the Petition for Writ of Certiorari") does not comply with Rule 27, paragraph 2 (a) of this court. We do not expect that the Court will, as a penalty against the respondent for its failure to comply with said rule, cease consideration of petitioner's

application for certiorari and forthwith grant the writ. We suggest, however, that if the Court would follow that course its action in so doing, based upon a clear violation by respondent of its rule, would be more nearly justified than the action of the Missouri Supreme Court in dismissing petitioner's appeal without a hearing on the merits for the unsubstantial excuse asserted in the Missouri Supreme Court's opinion.

If the petitioner complied with Rule 15 of the Missouri Supreme Court, and, notwithstanding such compliance, his appeal was dismissed contrary to the decisions of said Court in deciding the appeals of all other appellants under like circumstances, then the petitioner has not received that equality of treatment which the Fourteenth Amendment assures him. We may say concerning the dismissal of petitioner's appeal as a violation of the constitutional amendment what this Court said in Truax v. Corrigan, supra, l. c. 336, to wit:

> "To hold it not to be, would be, to use the expression of Mr. Justice Brewer in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255, to make the guaranty of the equality clause 'a rope of sand.' "

Respectfully submitted,

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